

RECENT DECISIONS

Recent Decisions is a periodic communication from the Legal Section of the Indiana Department of Education to the Indiana State Board of Education, the Indiana Board of Special Education Appeals, Administrative Law Judges/Independent Hearing Officers, Mediators and other constituencies involved in or interested in publicly funded education. Full texts of opinions cited or documents referenced herein may be obtained by contacting Kevin C. McDowell at (317) 232-6676 or by writing to the address listed above.

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Incarcerated Youth, Educational Services And Transfer Tuition

A series of significant decisions by the Indiana State Board of Education culminated recently in In the Matter of A.S., Jr. (SBOE, 1993) Cause No. 9209031, included herein as Attachment A. The student was a 17-year-old pre-trial detainee charged with murder but incarcerated in an adult facility which did not provide an educational program. The student's trial date was over nine months away, and he expressed a desire to continue his education while incarcerated. Three general issues were

presented to the Board:

1. Whether the student is entitled to educational services as a pre-trial detainee;
2. What party, if any, has a duty to provide educational services to the student; and
3. What party, if any, is obligated to pay the costs of educational services provided to the student.

Because the issues involved school attendance, especially at a correctional facility, and presented for the first time matters of interpretation and application of both the Compulsory School Attendance Law (IC 20-8.1-3) and the Transfer Tuition Law (IC 20-8.1-6.1), the State Attendance Officer intervened under his statutory authority at IC 20-8.1-3-16. Eventually, there were six parties to the dispute.

1. Whether petitioner is entitled to educational services as a pre-trial detainee.

The student was under the age of 18 years and desired to continue his education. He was being held as a pre-trial detainee and had not been convicted of a crime. Had he been convicted and sentenced, he would have been entitled to educational services. Citing Lock v. Jenkins (7th Cir., 1981) 641 F.2d 488, the State Board held that the requirement of equal protection dictates "that pretrial detainees may not be treated less favorably than convicted persons, unless the difference in treatment is justified by a legitimate government interest." There was no "legitimate government interest" involved in this situation such that the student could not receive educational services.

2. What party, if any, has a duty to provide educational services to the student.

The State Board had to consider the requirements of IC 20-8.1-3-36 (addressing, in part, the duty of correctional institutions to ensure a student under their authority "attends school") and IC 20-8.1-6.1-5 (payment of transfer tuition) balanced against previous State Board decisions and the State Board's own statutory authority, particularly at IC 20-8.1-3-1 and 2 (legislative intent to provide a "proper education" for students less than 18 years of age whenever it is "reasonably possible").

The jail where the student was incarcerated was not located in either the student's county or the school corporation of legal settlement. The jail did not provide educational services, but it had the requirement to ensure the student "attends school." Several significant interpretations of IC 20-8.1-6.1-5 have enabled the application of legislative intent by the State Board.

Under IC 20-8.1-6.1-5(a), a student who is placed in " a state licensed...child care facility...[b]y a court order...may attend school in the school corporation in which the home or facility is located." While the jail had become a "child care facility," it was not "state

licensed" as more traditional child care facilities are. However, the jail was not required to be "state licensed" as a traditional child care facility would be. Nevertheless, it was "licensed" by state law. The State Board, in an earlier decision interpreting what is meant by "state license," held that where no state license is required for a particular child caring facility and the state permits the facility to operate, that permission creates a *de facto* licensure which satisfies the requirement for transfer tuition. See New Horizons Maternity Home (SBOE, 1990) Cause No. 9005028, included herein as Attachment B.

The State Board also found that the term "attend school" has a broader meaning than argued. The State Board specifically rejected defining "attend school" as meaning a student had to be physically present at a school facility or it was not "reasonably possible" to educate the student. The State Board noted that IC 20-8.1-1-7.2 broadly defines "attending school" and specifically includes situations where the student could not be present physically in a school building. "Attend school" means receiving educational services from a school such that compulsory attendance requirements are satisfied.

Because the jail did not provide educational services, the student could receive educational services from the school corporation where the jail is located.

3. What party, if any, is obligated to pay the costs of educational services provided the student.

IC 20-8.1-6.1-5(a) provides further that "[i]f the school corporation in which the home or facility is located is not the school corporation in which the student has legal settlement, the county of the student's legal settlement shall pay the transfer tuition of the student." Once the threshold questions of licensure and "attend school" were crossed, the fact the student was placed by court order obligated the student's county of legal settlement to pay the transfer tuition to the school corporation providing the educational services.

The State Board had previously addressed this provision and strictly applied the language. In In Re B.E.T. (SBOE, 1992) Cause No. 9106044, the State Board rejected arguments that a court through juvenile delinquency adjudications becomes a student's "parent" thus obligating the school corporation of legal settlement to pay the transfer tuition under IC 20-8.1-6.1-5(b). The State Board found that the court proceedings did not affect or abridge the rights of the student's natural parents, who were not parties to the court action. Even though the student was sentenced by a county that was not the county of legal settlement, the transfer tuition was still the obligation of the student's county of legal settlement.

Also available upon request:

In the Matter of A.S., Jr. Brief of the State Attendance Officer (RD Doc. #1).

In Re B.E.T. (SBOE, 1992) Cause No. 9106044 (RD Doc. #2).

Do Not Resuscitate (DNR) Agreements

Increasing numbers of students with deteriorating medical conditions or painful terminal illnesses are able to attend school. Some of these medically fragile students have Do Not Resuscitate (DNR) Orders or Agreements which parents or guardians have requested the schools to adhere to. This uncomfortable situation is not experienced by Indiana schools alone. An article in Education Week, December 16, 1992 (p. 4), described the same situation in Maine as you will find in Attachment C.

Because we were receiving increasing numbers of requests for assistance, the attached was first provided to the schools through the Superintendents' Mailing for January 22, 1993.

Videotaping As An Educational Tool And As A Security Measure

In Recent Decisions 1-6:91, Complaint No. 579-91 was reported, which concerned an investigation that defined when the use of videotaping of a student constituted an evaluation process requiring prior notice to the student's parent or guardian under special education requirements.

Attachment D is a response to a school administrator requesting clarification of Complaint No. 579-91 and how this can be distinguished from other in-house utilizations of videotaping not associated with program evaluation.

Attachment E is a response to School Traffic Safety regarding the use of videotaping on school buses. These videotapes are not, in and of themselves, part of an educational record, but could become such if employed for educational reasons (such as pupil discipline). Security of the videotapes themselves is a major concern, both in access to such tapes and in their collection, maintenance and destruction.

Recusal And Interlocutory Appeals

In Article 7 Hearing No. 613-92, an issue arose over the impartiality of the Independent Hearing Officer (IHO). The IHO was requested to recuse himself. Following consideration of the request, the IHO declined to do so. The attorney for one of the parties attempted to have the IHO removed

by either the Indiana State Board of Education, the Indiana Department of Education, or the Indiana Board of Special Education Appeals. The first two could not exercise jurisdiction and the third refused to accept the pleadings in that rulings by IHO's are not reviewable unless or until such rulings are incorporated into a final order. The Board did eventually review the matter but only after the IHO had entered a final order. One issue on appeal was the status of an IHO under Indiana law and whether the Board of Special Education Appeals had immediate jurisdiction. The State's position is included at Attachment F. The Board adopted this position. The Board's ruling in this matter establishes:

1. An IHO has more authority than an Administrative Law Judge (ALJ) under IC 4-21.5-3 in that they cannot be removed by a higher administrative entity with reviewing authority.
2. Interim rulings by IHOs are not subject to review by the Board of Special Education Appeals through an interlocutory appeal.
3. Interim rulings by IHOs are reviewable by the Board after a final order is issued to ensure procedures employed by the IHO are consistent with due process.
4. If the Board should determined that the due process procedures were flawed, the Board would have to hear the matter itself. Federal law does not provide for remand.

Two recent federal policy letters support the Board's interpretation of due process procedures under the Individuals with Disabilities Education Act (IDEA). See Hatchcock (OSEP, 1993) 19 IDELR 631 (refusal of an IHO to hear or decide an issue is not subject to review by or through the complaint investigation process but either by a proper reviewing authority in a two-tier state or by a civil court with jurisdiction) and Landry (OSEP, 1993)

19 IDELR 632 (procedural errors by an IHO are reviewable by a proper administrative reviewing authority in a two-tier state and can be remedied by this reviewing authority).

The Board recently reiterated its position on recusal and final orders in Article 7 Hearing No. 639-92.

Hearsay Evidence And Objections In Administrative Hearings

In Vanderburgh County Department of Public Welfare v. Deaconess Hospital, Inc. (Ind. App., 1992) 588 N.E.2d 1322, the sworn testimony of a physician established the existence of a medical condition for his patient. No competent or probative medical evidence was presented to contradict this testimony. Over objections of one of the parties, the ALJ allowed a welfare caseworker to introduce into evidence a letter from a medical director for welfare indicating the medical condition did not meet the criteria utilized in-house for determining reimbursable costs. The ALJ concluded the patient's medical condition did not meet the requirements of the unpublished criteria, and based this conclusion on the hearsay evidence contained in the letter which had been objected to.

IC 4-21.5-3-26(a) states in relevant part: "The administrative law judge may admit hearsay evidence. If not objected to, the hearsay evidence may form the basis for an order. However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence." The court overturned the ALJ, and the court's decision was sustained on appeal. It was determined the ALJ's legal conclusion was arbitrary and capricious, was not reached in accordance with the law, exceeded statutory authority, and was rendered without observance of due process procedures as required by law (at 1326, 1328).

The court also noted that the public agency lacked ascertainable standards which were well stated and followed in denying the reimbursement. Basing a decision on unwritten rules, the court noted, is arbitrary and capricious. "Two reasons counsel against permitting agency actions based on unwritten rules: first, parties are entitled to fair notice of the criteria by which their petitions will be judged by an agency, and second, judicial review is hindered when agencies operate in the absence of established guidelines" (at 1327). Also see footnote 2, p. 1328 for a discussion of what constitutes a "rule."

For additional information, see Recent Decisions 7-12:91 and "Evidentiary Concerns In Administrative Hearings" by Dennis N. Owens, Esq., in Programs, Policies & Procedures 8-9:88.

Official Notice And Ordinances

In Gonon v. State (Ind. App., 1991) 579 N.E.2d 614, plaintiff's conviction for violating an ordinance was overturned by the appellate court because the trial had taken judicial notice of a city ordinance. The appellate court, citing case law back to 1864, reiterated that municipal ordinances cannot be the subject of judicial notice but must be proved.

IC 4-21.5-3-26(f) permits an ALJ to take official notice of "[a]ny fact that could be judicially noticed in the courts" as well as the record of other proceedings before the agency, technical or scientific matters within the agency's specialized knowledge, and codes or standards adopted by an agency of the United States or Indiana. While municipal ordinances have rarely appeared in proceedings before an ALJ, it has occurred. The relaxed standards for admission of evidence would tend to permit admission of an ordinance, but such admission would have to be based on a reason other than the ALJ's discretion to afford official notice.

Witness Lists And Rebuttal Witnesses

In McCullough v. Archbold Ladder Co. (Ind. App., 1992) 587 N.E.2d 158, the Indiana Court of Appeals reversed a judgment for the defendant based on the trial court's abuse of discretion in excluding testimony of the plaintiff's rebuttal expert witness based on the plaintiff's failure to disclose the rebuttal witness on her witness list. "Generally, a party is under no obligation to provide

a list of rebuttal witnesses," the court wrote. "[T]he very nature of such a witness makes it impossible to anticipate him being called. In other words, although one may foresee the possibility of calling a rebuttal witness, one cannot anticipate the necessity of calling the rebuttal witness until the opposing party's evidence creates the need."

The appellate court, citing an Indiana Supreme Court decision, said a rebuttal witness is permissible even though his name is not on the witness list (at 159, 160).

For most administrative hearings, IC 4-21.5-3-19(c)(5) and (7) permit prehearing orders to regulate the identification of witnesses and the limitation of their numbers, as well as the extent to which rebuttal evidence can be presented in written form. IC 4-21.5-3-25(c) and (d) require an ALJ to afford all parties the opportunity to, among other things, "submit rebuttal evidence...[t]o the extent necessary for full disclosure of all relevant facts and issues." Any limitations on the submission of rebuttal evidence would be controlled either by prehearing order or, following issuance of a prehearing order, by imposition of conditions to avoid unreasonably burdensome or repetitious presentations by a party.

An ALJ needs to balance the orderly and prompt conduct of a proceeding with the just conduct of the proceeding.

In special education proceedings, a party has the right to prohibit the introduction of any evidence at the hearing which has not been disclosed at least five (5) days before the hearing. 34 CFR 300.508(a)(3) and 511 IAC 7-15-5(j)(3). The "Five-Day Rule" would not apply to a rebuttal witness. "Rebuttal evidence" is not "evidence." "Rebuttal evidence is that which tends to explain, contradict, or disprove an adversary's evidence." McCullough, *supra*, at 161.

Rebuttal evidence presupposes there is before the ALJ evidence from an adversary to rebut.

For further discussions on the "Five Day Rule," see Recent Decisions 5:87, 6-7:88; and 1-3:89.

Attorney Fees And Witness Fees

Attachment G is a communication to the Board of Special Education Appeals, IHOs and Mediators regarding attorney fee requests in special education matters. The memorandum reiterates previous positions that attorney fee questions are not suitable for due process procedures under Article 7.

While IDEA provides a mechanism for a prevailing parent to recover attorney fees, it is uncertain whether IDEA would permit a prevailing parent to recover costs associated with the testimony of a witness for the parent. In the only reported case to date Aranow v. District of Columbia (D.C. DC, 1992) 780 F.Supp. 46, the federal district court awarded the parents recovery of the attorney fees under IDEA but refused to award as a reimbursable cost the fees for non-testifying, expert witnesses. Citing West Virginia University Hospitals, Inc. v. Casey 111 S.Ct. 1138 (1991), a U.S. Supreme Court decision on analogous language under other civil rights legislation, the court declined to broaden the scope of "costs" to include fees for services by an expert witness employed by a party

in a nontestimonial, advisory capacity.

It is advisable to include in the initial contact letter that not only are the costs associated with retaining the services of a witness the responsibility of the requesting party, but that these costs may not be recoverable through IDEA. This statement could appear where the IHO advises the parties of subpoena powers and procedures.

See also Recent Decisions 5-6:86 and Recent Decisions 6-7:88, which addressed the subpoena authority of an IHO/ALJ and the discretion which can be exercised. There are also other more convenient and less expensive means for obtaining testimony.

Ex Parte Communications: Part II

In Recent Decisions 1-6:91, the statutory requirements and proscriptions regarding ex parte communications were detailed. Because this continues to be a problem, I have reprinted part of the previous information:

IC 4-21.5-3-11 proscribes generally all communication with any party or interested individual regarding any issue pending before the ALJ or board member.

IC 4-21.5-3-11(b) permits ALJs or board members to receive aid from staff except that such staff may not convey prohibited communications nor can such staff provide information that affects in any way evidence before the ALJ or board.

IC 4-21.5-3-11(d) requires that an individual who receives ex parte communications prior to appointment as an ALJ (or before the board receives a petition) shall, upon assuming jurisdiction, disclose the communication as follows:

1. The communication received shall be placed on the record, with the offending individual identified, and
2. The parties shall be advised that these matters have been placed on the record. See also IC 4-21.5-3-11(e).

The identified offending party has fifteen (15) days after receiving notice of disclosure on the record of the improper communications to request the opportunity to rebut the charge of wrongful ex parte communication.

Under IC 4-21.5-3-36 and 37, an ALJ or board member who knowingly or intentionally receives such communication commits a Class A misdemeanor. In short, this is a criminal offense. The same applies to the individual who aids, induces or causes an ALJ or board member to receive such ex parte communication.

Improper ex parte communications place in question the impartiality and ability of the ALJ or board member and affect due process generally. It is recognized that telephone conversations will occur, but care is needed to advise strongly a party exceeding merely procedural questions that such communication must cease. While some ALJs have secretarial assistance which can significantly reduce direct communications with the ALJs, not all are so fortunate. The parties should be advised against such direct communications in the notice of appointment letter. When one party does begin to engage an ALJ in conversation which may, in the ALJ's opinion, exceed mere procedural questions, the party should be advised to put his/her concerns in writing and provide a copy to the other party.

If an ALJ or board member does receive such unauthorized communication, insure that such is included in the record as required by statute.

See also Hollenbeck v. Board of Education of Rochelle Township (N.D. Ill., 1988) 699 F.Supp. 658 (IHO's hearing decision annulled due to taint by ex parte communication with a witness prior to the hearing).

Full Inclusion And Individualized Programming

"Full inclusion," like "obscenity," is one of those concepts defined by what it is not rather than what it is. In Complaint No. 758-93, a school proposed to program all its middle school students into "full inclusion" programs. Students, including most students with disabilities, would be in general education classes 100 percent of the school day with special education services provided by aides who, in turn, would be supervised by teachers licensed in special education. The parent of a student with learning disabilities challenged the proposed programming through the special education complaint process found at 511 IAC 7-15-4. The student currently requires resource room services for thirty (30) percent of the school day. The proposed middle school placement would not include a resource room or a teacher certified to teach students with learning disabilities. Paraprofessionals would implement the student's goals and objectives under the supervision of a teacher with a limited license for LD. The teacher with the limited license would actually be located at another school but would be designated the student's "Teacher of Record" (511 IAC 7-3-50). No alternatives were offered.

The Division of Special Education cited the school corporation for failure to consider a full continuum of placement options for the student as required by 511 IAC 7-12-2 (least restrictive environment) and for not delineating those persons who would actually implement certain portions of the student's individualized education program (IEP).

A discussion section in the complaint reminds parties that "full inclusion" is neither a mandate nor a legal requirement, and is not a substitute for considering, on an individual basis, what the least restrictive environment is for a given student.

For additional discussion on "Inclusion" in Indiana, please request a copy of the following:

1. "There's Glory For You: The Humpty Dumpty Dilemma (Inclusion In Indiana: The Official Unofficial Definition)" (RD Doc. #3).
2. "Inclusion and Social Justice: Enabling And Empowering School Effectiveness" (RD Doc. #4).

The following are available upon request but not included with this document.

1. Legal Effect of Behavior Contracts (RD Doc. #5). Behavior contracts are educational tools and not legally enforceable contracts. A contract is a result of bargaining and consideration, which creates legal obligations on behalf of the parties to the contract. In this situation, the "behavior contract" required the student to withdraw from school for violating the contract's terms. No such "contract" is permitted or enforceable under Indiana law.
2. Discipline As An Educational Tool: Policy and Program Issues for Public Agencies and Their Constituencies (RD Doc. #6). This is a comprehensive review of disciplinary interventions and techniques employed with school-aged children. This reference document addresses both special and general education situations.
3. Child Labor Laws and Special Education (RD Doc. #7). This paper explains the general applications of child labor laws to all students and to students with disabilities, particularly as such laws apply to community-based functional curricula. Included also is a joint statement of the U.S. Departments of Education and Labor addressing the same issue.

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1-12:92